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Costa Rican Supreme Court Enforces against Non-Signatory

Karima Sauma (CICA-AmCham) · Saturday, May 8th, 2021

On February 28, 2021, the First Chamber of the Costa Rican Supreme Court (“the Court”) confirmed a US\$ 23 million ICC award won by Panama-registered Hidroeléctrica San Lorenzo S.A. against Saret de Costa Rica S.A.

When it comes to the recognition and enforcement of foreign arbitral awards, Costa Rica is party to relevant international conventions, but has also recently enacted domestic legislation that regulates this matter further. Costa Rica ratified the [Inter-American Convention on International Commercial Arbitration](#) (the “Panama Convention”) in 1998, and the [Convention on the Recognition and Enforcement of Foreign Arbitral Awards](#) (the “New York Convention”) in 1988. Additionally, Costa Rica’s [International Commercial Arbitration Law](#) is based on the UNCITRAL Model Law with the 2006 amendments.

In 2018, Costa Rica enacted a new [Code of Civil Procedure](#) in which it included provisions related to the recognition and enforcement of foreign arbitral awards. These provisions added a thin layer of confusion to the legal interpretation because these new provisions seemed to forget the regime already in place via the instruments mentioned above.

The Costa Rican Supreme Court, as the judicial authority in charge of deciding all applications for recognition and enforcement of foreign awards, has the prerogative to decide how the interplay between all of these legal instruments will play out. In certain decisions, such as the one discussed here, the Court limited its analysis to the Civil Procedure Code, and did not mention the other (very) relevant instruments pertaining specifically to the enforcement of foreign arbitral awards.

Background to the Dispute

Hidroeléctrica San Lorenzo S.A. filed a request for arbitration in December 2014 for breach of contract against Saret de Costa Rica S.A. and Grupo Corporativo Saret de Panamá S.A. The case was decided by an ICC tribunal – sole arbitrator Fernando del Castillo – seated in Panama City.

Hidroeléctrica San Lorenzo (HSL) and Saret de Panamá entered into a contract to construct and exploit the San Lorenzo Hydroelectric Central located in the Fonseca River in the Province of Chiriquí, Panama. The dispute related to various claims for breach of contract.

Hidroeléctrica San Lorenzo alleged that the Respondents willfully breached the contract,

intentionally harming HSL. Additionally, HSL submitted that Saret de Panamá and Saret de Costa Rica acted together in the execution of the works, which is why their actions should be considered as a unit.

On April 11, 2016, the tribunal issued a Partial Award on Jurisdiction (the “Partial Award”) in which it decided that it had jurisdiction and could hear claims against both Saret de Panama and Saret de Costa Rica. Saret de Costa Rica argued that it was not a party to the contract, and therefore, had not agreed to be bound by the underlying arbitration agreement.

In its decision, the tribunal explained that in general terms, Panama’s [Arbitration Law](#) expressly established the competence-competence principle. Additionally, the tribunal pointed that the “*Sala Cuarta de Negocios Generales*” of the Panamanian Supreme Court had previously allowed the extension of the effects of an arbitration agreement to non-signatories in other cases.

In particular, the tribunal decided that the following elements were necessary in order to determine its jurisdiction over Saret de Costa Rica: i) the existence of a corporate group, ii) the non-signatory’s participation in the preparation and negotiation of the contract, iii) the non-signatory’s participation in the drafting of the documents on which the dispute was based, iv) the non-signatory’s participation in the performance of the contract, and, if applicable, in its termination, and v) the presumption that the non-signatory had previous knowledge of the arbitration agreement. Ultimately, the tribunal considered that Saret de Costa Rica met all the requisites.

Saret de Costa Rica sought to set aside the Partial Award before the Supreme Court of Panama, but the challenge was ultimately rejected.

On October 20, 2017, the tribunal issued the Final Award in which it granted Hidroeléctrica San Lorenzo S.A. approximately US\$ 23 million in damages plus interest. Saret de Costa Rica tried to set aside the Final Award before the Supreme Court of Panama, but the Court also upheld the Final Award.

Costa Rican Proceedings

Hidroeléctrica San Lorenzo S.A. requested the enforcement of the Partial Award and the Final Award mentioned above before the First Chamber of the Costa Rican Supreme Court.

In its analysis, the Court highlighted the fact that it did not have jurisdiction to reopen the discussion on the merits of the case, but rather its reach was limited to the verification of the requirements established in Article 99.2 of the Civil Procedure Code.

Saret de Costa Rica opposed the enforcement by alleging: i) the incorrect application of the arbitration clause; ii) the lack of consent to the arbitration agreement; iii) lack of due process; iv) infringement with respect to the constitution of the arbitral tribunal and the arbitral procedure; and v) the existence of a pending litigation in Costa Rica.

With respect to the first two claims, Saret de Costa Rica argued that it was not a party to the arbitration clause, and that it never expressed consent in a way that would allow the tribunal to extend its effects to it. The Court explained that this point was already studied and decided by the arbitral tribunal in the Partial Award and by the Supreme Court of Panama, so it was not up to the

Court to review it again.

As to the lack of due process argument, Saret de Costa Rica submitted that Hidroeléctrica San Lorenzo S.A. did not comply with the conflict resolution phase provided for in the contract before submitting a claim to arbitration. Here, the Court again explained that this pertained to the merits of the case and was an argument that was already rejected by the Panamanian judicial authorities. The Court also used this explanation to reject the fourth claim, that also had to do with the general arbitration procedure.

As for the final claim regarding a pending litigation in Costa Rica, the Court rejected it because the complaint for the parallel litigation was filed by Saret de Costa Rica against Hidroeléctrica San Lorenzo S.A. on the same day that it filed its response to the petition for enforcement. The Court added that in order for this to be an obstacle for the recognition and enforcement of an award, the parallel procedure must be filed before, not after, the petition to enforce.

Conclusion

The Court finally rejected Saret de Costa Rica's arguments and enforced the Partial Award and the Final Award in Hidroeléctrica San Lorenzo S.A.'s favor. This decision shows that Costa Rica's Supreme Court is respectful of international arbitration and of the relevant authorities in charge of addressing matters such as the ones raised by Saret de Costa Rica. In its decision, the Court limited the scope of its analysis and generally deferred to the arbitral tribunal's and the Panamanian courts' decisions.

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